

Lone Star Industries, Inc. and Teamsters Local Unions 822 & 592 a/w International Brotherhood of Teamsters, AFL-CIO.¹ Case 5-CA-12015

November 9, 1992

SECOND SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT
AND RAUDABAUGH

The sole issue on remand from the United States Court of Appeals for the D.C. Circuit is whether the Respondent violated Section 8(a)(3) and (1) of the Act by breaching a strike settlement agreement to recall former economic strikers by seniority.²

We accept the remand and we therefore accept, as law of the case, the court's conclusions. Applying those conclusions, we find that the Respondent violated Section 8(a)(3) and (1) of the Act.

Prior decisions in this proceeding have fully described the factual situation here. In brief, employees represented by the Unions commenced an economic strike against the Respondent on April 23, 1979, during negotiations for a new contract. The Respondent eventually hired permanent replacements for all strikers. On June 8, the Unions sent the Respondent a telegram accepting the contract proposal which it made at the last bargaining session on May 9. According to credited testimony, that proposal included an offer to recall strikers to job vacancies in the order of seniority.

In response to the Unions' telegram, the Respondent sent a letter on June 8 informing the Unions that all strikers had been permanently replaced and that it was withdrawing recognition based on a claimed good-faith doubt of the Unions' continuing majority status. The Respondent recalled former strikers in the order of seniority until May 1980. Thereafter, it recalled strikers on the basis of other factors.

¹ The name of the Charging Party has been changed to reflect the new official name of the International Union.

² The Board issued its original Decision and Order in *Lone Star Industries*, 279 NLRB 550 (1986), which was enforced in part and remanded in relevant part for further explanation on the pending issue. *Lone Star Industries v. NLRB*, 813 F.2d 472 (D.C. Cir. 1987). In a Supplemental Decision and Order, the Board reaffirmed its prior conclusion that the Respondent did not violate Sec. 8(a)(3) and (1) by refusing to recall strikers by seniority. *Lone Star Industries*, 298 NLRB 1075 (1990). Subsequently, the Unions petitioned for review in the D.C. Circuit. Thereafter, the court granted the Union's petition for review and again remanded the case to the Board for further proceedings consistent with the court's opinion. *Teamsters Locals 822 and 592 v. NLRB*, 956 F.2d 317 (1992).

On April 28, 1992, the Board notified the parties that it had accepted the court's remand and invited the filing of statements of position. Thereafter, the General Counsel, the Unions, and the Respondent filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The original charges and complaint against the Respondent included the allegation that the withdrawal of recognition violated Section 8(a)(5) of the Act. The Board granted the Unions' request to withdraw the 8(a)(5) charges on March 11, 1982. In its original decision, the Board dismissed the allegation that the Respondent violated Section 8(a)(3) by failing to recall strikers by seniority in and after May 1980. In support of this dismissal, the Board emphasized the fact that the 8(a)(5) charges had been withdrawn.

The D.C. Circuit found the Board's rationale inadequate on this issue and remanded for further explanation.

In its supplemental decision, the Board found that the Respondent's departure from a seniority recall procedure did not violate Section 8(a)(3), even if that procedure had been required by a strike settlement agreement.³ The Board reasoned that: the Union's withdrawal of all 8(a)(5) allegations negated any possible inference of union animus deriving from the alleged breach of the strike settlement agreement; there was no statutory right to recall by seniority; and there was no evidence that the strike settlement agreement adversely affected former strikers vis-a-vis nonstrikers or new employees, or that the Respondent's criteria discriminatorily favored other employees over strikers. In a footnote, the Board distinguished the present case from *United Aircraft Corp.*⁴ and *Hotel Roanoke*,⁵ where the Board found 8(a)(3) violations for breaches of strike settlement agreements. The Board reasoned that in those cases, unlike in this case, "the specific acts that breached the agreements . . . discriminatorily favored nonstrikers at the expense of strikers."⁶

On review of the Board's supplemental decision, the D.C. Circuit vacated the Board's decision and remanded. The court rejected the Board's effort to distinguish *United Aircraft* and *Hotel Roanoke*. The court construed those cases as resting upon the following rationale:

Employees settle strikes through contract at least in part because they expect their employer to honor the terms of a settlement. Breaches by the employer of strike settlements negotiated by unions sap the employees' power to achieve their goals by bargaining and thereby discourage mem-

³ In both the original and supplemental decisions, the Board assumed, arguendo, that the parties concluded an agreement to recall former strikers by seniority. Based on the credited testimony, we expressly find that the Respondent's May 9 bargaining proposal included the seniority recall offer. We further find that the Unions' June 8 acceptance of this outstanding offer prior to the Respondent's withdrawal of recognition created a binding agreement.

⁴ 192 NLRB 382 (1971), modified 534 F.2d 422 (2d Cir. 1975), on remand 247 NLRB 1042, 1045 (1980), enf. mem. 661 F.2d 910 (2d Cir. 1981).

⁵ 293 NLRB 182 (1989).

⁶ 298 NLRB at 1077 fn. 6.

bership in the labor organizations that give the employees at least some of their bargaining power in the first place.⁷

The court held that the Board had “spurned its prior precedent,” and that the Board had not explained why it had done so. The court therefore remanded the case to the Board for further explanation.

The Board has accepted the court’s remand and thus the court’s opinion is the law of the case. The law of the case includes the court’s construction of *United Aircraft* and *Hotel Roanoke*. Applying that law, we find a violation in this case.

We have found that the Respondent breached the seniority recall provision of the strike settlement agreement accepted by the Unions on behalf of the strikers on June 8, 1979. Pursuant to the principle of *United Aircraft* and *Hotel Roanoke* as construed by the D.C. Circuit, this breach had an adverse impact on the strikers’ rights to join and bargain collectively through unions. Even if the adverse effect was “comparatively slight,” the burden shifted to the Respondent to prove a legitimate and substantial business justification for its conduct.⁸ The Respondent has not attempted to offer such proof. Accordingly, we find on the law of the case that the Respondent breached the strike settlement agreement by failing to recall former strikers in the order of seniority violated Section 8(a)(3) of the Act.

AMENDED REMEDY

Having found that the Respondent has unlawfully failed to recall former economic strikers employees in the order of seniority, we shall require the Respondent to abide by the agreed seniority recall system, to reinstate immediately all former strikers who would have been recalled earlier under a seniority system, and to make them whole for any loss of earnings and other benefits suffered as the result of discrimination against them. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Lone Star Industries, Inc., Norfolk and Richmond, Virginia, its officers, agents, successors, and assigns, shall take the action required in the Board’s Order reported at 279 NLRB 550, as modified below.

1. Insert the following as paragraph 1(c) and reletter the subsequent paragraph.

“(c) Discriminating against employees engaged in union and other protected concerted activities by failing to adhere to a strike settlement agreement providing for the recall of former strikers in the order of seniority.”

2. Insert the following as 2(b) and reletter the subsequent paragraphs.

“(b) Reinstate and adhere to the strike settlement provision for recalling former strikers to job vacancies, offer immediate and full reinstatement to all strikers who should have been recalled previously based on seniority, and make them whole, with interest, for any loss of earnings and benefits suffered as a result of the unlawful failure to recall them in proper seniority order.”

3. Substitute the attached notice for that of the Board in its original Decision and Order.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discourage membership in Teamsters Local Union 822 a/w International Brotherhood of Teamsters, AFL–CIO, and Teamsters Local Union 592 a/w International Brotherhood of Teamsters, AFL–CIO, or any other labor organization, by disqualifying for reinstatement those employees who have engaged in a lawful strike on the basis that such employees were deemed by us on the basis of insufficient information to have obtained comparable employment.

WE WILL NOT discourage membership in the aforesaid labor organizations, or in any other labor organization, by discontinuing the assignment of work in accordance with seniority of reinstated employees who have engaged in a lawful strike and have made unconditional applications for reinstatement to vacant positions as they occur, without prejudice to their seniority and other rights and privileges, or by otherwise discriminating against any of our employees in regard to

⁷ 956 F.2d at 319.

⁸ See *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967).

their hire, tenure of employment, or other terms or conditions of their employment.

WE WILL NOT discriminate against our employees by failing to recall and reinstate them in accordance with their seniority pursuant to terms reached in our strike settlement agreement with the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights guaranteed by Section 7 of the Act.

WE WILL offer immediate and full reinstatement to any striker who would otherwise have been reinstated but for our practice of disqualifying for reinstatement employees who we deemed on the basis of insufficient information to have obtained comparable employment to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their exclusion from recall because they were deemed

to have obtained comparable employment on the basis of insufficient information, less any net interim earnings, plus interest.

WE WILL immediately reinstate the practice of assigning work and overtime to employees in accordance with seniority and WE WILL make whole recalled strikers for any loss of earnings resulting from our not assigning work and overtime to them on the basis of seniority, plus interest.

WE WILL reinstate and adhere to the strike settlement agreement to recall former strikers by seniority, WE WILL offer immediate and full reinstatement to any former strikers who should have been recalled earlier based on seniority, and WE WILL make them whole, with interest, for any loss of earnings and benefits pay, they may have suffered by reason of our discriminatory failure to recall them by seniority.

LONE STAR INDUSTRIES, INC.